No. 88-1155

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROWN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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1. In response to Petitioner's principal argument that a state agency should be presumed to have waived its right to seek abstention if it allows a case to proceed to trial on the merits and judgment in the district court, Respondents first argue that as a matter of law a state agency never waives abstention by failing to seek abstention prior to appeal. However, Respondents' argument relies primarily on cases applying the *Pullman* branch of the abstention doctrine.[1] As Crown Life recognized in its

[1] *Railroad Commission v. Pullman Company*, 312 U.S. 496 (1941). Respondents also cite the four circuit court cases on which the Tenth Circuit
(Footnote continued)

Petition, this Court has held that the litigants may not waive the application of the *Pullman* doctrine because that doctrine implicates the federal court's own institutional interest in avoiding constitutional adjudications that may be made unnecessary by a state court's construction of an ambiguous statute. *See* Petition at 6, n.5. The Court has expressly held that a state agency may waive the protection of *Younger* abstention,[2] because that doctrine is intended to benefit the state by avoiding unnecessary federal interference in its judicial proceedings. *Ohio Bureau of Employment v. Hodory*, 431 U.S. 471, 480 (1977). *See* Petition at 6. The same reasoning must apply to *Burford* abstention,[3] because it, like *Younger*, is founded on considerations of comity rather than reluctance to adjudicate constitutional issues.

2. Respondents next argue that, on the merits, this is a case in which abstention is appropriate. However, the merits of Respondents' abstention arguments are irrelevant to the issue of whether Respondents should be presumed to have waived abstention by failing to seek the appropriate relief prior to trial and the entry of judgment. No matter how strong the arguments for abstention may be, this Court has held that a state agency may waive the protection of the abstention doctrine, *Ohio Bureau of Employment v. Hodory*, 431 U.S. 471, 480 (1977), and an agency should not be allowed to defer its decision to seek abstention until after a district court has invested the resources necessary to try and decide a case. Regardless of whether a district judge invests one day or a hundred days in trying a case, the approach followed by the Tenth Circuit here will encourage the waste of judicial resources by allowing a state agency to hold its abstention arguments in reserve until the agency learns whether it will prevail on the merits in the federal court. A rule

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relied in the opinion below. These cases were distinguished in the Petition at 8, n.8, as cases in which the district court had resolved the litigation in its early stages, without conducting a trial.

[2] *Younger v. Harris*, 401 U.S. 37 (1971).

[3] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1983).

that places no penalty on a state agency that fails to raise its abstention arguments prior to trial, the entry of judgment, and appeal will in fact frustrate the proper functioning of the abstention doctrine. Abstention should be applied in a way that encourages litigants to identify potential conflicts between federal and state interests early in the federal litigation, before substantial federal judicial resources have been invested in the case, and before there has been any interference with the functioning of the state's regulatory or judicial system by virtue of the pendency of the federal litigation.[4]

3. Finally, Respondents argue that because the Tenth Circuit was applying *Burford* abstention rather than *Younger* abstention, there is no conflict between the Tenth Circuit's decision herein that allowed abstention to be raised initially on appeal and the Seventh Circuit's decisions in *Serpas v. Schmidt*, 827 F.2d 23 (7th Cir. 1987) and *Mazanec v. North Judson - San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985) that held that a state agency is presumed to have waived abstention if it fails to seek abstention prior to trial.[5] However, as the Petition demonstrates,

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[4] The inefficiencies and unfairness that can result from a state agency's delay in invoking the abstention doctrine are illustrated by the facts of this case. While this case was pending in the federal court, the liquidation of United Equity Life Insurance Company ("UELIC") went forward in the state courts, and it is Petitioner's understanding that the liquidation is now substantially completed. Remanding this case at the present time will not result in any meaningful opportunity to coordinate this litigation with the liquidation of UELIC in the state courts, but will instead simply submit Petitioner to the unfair burden of defending itself for a second time in a state-court forum which the Respondents find more advantageous now that they have learned how the federal court has ruled on the merits of their claims against Petitioner.

[5] Respondents also attempt to distinguish *Serpas v. Schmidt* and *Mazanec v. North Judson - San Pierre School Corp.* on the basis that both of these Seventh Circuit cases considered the possible application of *Pullman* abstention. Respondents' arguments are somewhat curious, because these cases involve *Pullman* abstention only to the extent that the Seventh Circuit found that *Pullman* abstention was not applicable in either case so as to rebut a presumption that there had been a waiver of the right to seek abstention. *Serpas v. Schmidt*, 827 F.2d at 27, n.2, *Mazanec v. North Judson - San Pierre School Corp.*, 763 F.2d at 847-48. As is pointed out in the Petition at 7, n.7, the rule

(Footnote continued)

both the *Younger* and *Burford* abstention doctrines are founded on considerations of federalism and comity, and are identical in all respects relevant to the issue raised by the Petition. Petition at 4-5. Despite the suggestions to the contrary in the Response, a state's interest in the enforcement of its criminal laws, which is the interest that the *Younger* doctrine was originally designed to protect, is every bit as compelling as the state's interest in developing coherent and uniform administrative policies, which is the context in which *Burford* evolved. Both these doctrines have been created by the federal judiciary for the protection of the state and its agencies. In return for the benefits of these doctrines, it is by no means unreasonable for a state agency to be required to invoke abstention in a timely fashion, before the federal district court has taken the time and effort necessary to try and decide a case, or suffer a presumption that the agency has chosen to waive its right to seek abstention.[6]

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in the Seventh Circuit, consistent with this Court's holdings that *Pullman* abstention cannot be waived by the litigants, is that the Seventh Circuit's presumption that abstention is waived if not raised prior to the trial and appeal is rebuttable by a showing that *Pullman* abstention is appropriate.

[6] Respondents also argue that their challenge to the district court's subject matter jurisdiction should be treated as equivalent to a request for abstention in the trial court. However, the question of whether the district court has subject matter jurisdiction of a case is separate and distinct, and turns on completely different legal considerations, from the question of whether the court should abstain from exercising that jurisdiction once it is found to exist. If Respondents had wished to seek abstention as well as question jurisdiction, they could have easily done so in a single pretrial motion, as was done by a similarly-situated liquidator of an insurance company in a case on which Respondents rely. *See Corcoran v. Ardra Ins. Co. Ltd.*, 842 F.2d 31 (2d Cir. 1988).

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